UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY **Plaintiff,** **v.** **ANTONELLI, TERRY, STOUT & KRAUS, LLP, et al.** **Defendants.**	)	**Case No.: 1:08 cv 1020- LO/TCB**

PLAINTIFF MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In this case, Minnesota Lawyers Mutual Insurance Company ("MLM") seeks a declaration that, under the terms of the professional liability policy issued by MLM to the law firm of Antonelli, Terry, Stout & Kraus, LLP ("Antonelli") and Antonelli partner Donald E. Stout ("Stout"), MLM owes no duty to defend Antonelli and Stout in a state court suit (the "Andros Suit") seeking to hold the attorney, his firm, and other defendants liable for damages in excess of $600 million, arising out of a broken promise to share in the proceeds of the "Blackberry Settlement" (as described in the Third Amended Complaint filed in that action).

Crucially, to come within coverage in the first instance, the claim must seek damages **resulting from** the rendering or failing to render legal services. As set forth below, the allegations of the Third Amended Complaint clearly do not assert damages resulting from the rendering or failing to render legal services. As a result, the allegations of the pleading never come within coverage in the first instance. And assuming *arguendo* that they did, the claims are unambiguously excluded under the Policy's Business Enterprise and Specific Entity Exclusions for the reasons set forth below, in MLM's Memorandum in Support of its Motion for Summary Judgment previously filed herein, and in MLM's Opposition to Plaintiff's Motion for Summary Judgment.[1] For all of these reasons, MLM owes no duty to defend or indemnify Defendants in the Andros Suit. As a result, MLM's Motion for Summary Judgment must be granted and Defendants' Motion for Summary Judgment must be denied.[2]

ARGUMENT

I. NO DUTY TO DEFEND EXISTS WHERE THE THIRD AMENDED COMPLAINT FAILS TO ALLEGE ANY DAMAGES "RESULTING FROM" THE PROVISION OF LEGAL SERVICES.

Before consideration of any Policy exclusions, it first must be determined whether the allegations of the Andros Suit come within the basic coverage provision of the Policy. To do so, the Third Amended Complaint must seek damages that "aris[e] [out of] an act or omission of the insured **resulting from** the rendering or failing to render legal services for others." Bullis v. Minnesota Lawyers Mut. Ins. Co., 2007 WL 4353760 * 5 (D.N.D. Dec. 10, 2007) (emphasis added) (discussing same policy provision as contained in the policy issued to the Antonelli firm). **A mere allegation that the attorney rendered legal services is not enough to trigger the potentiality of coverage – instead it must be alleged that the *damage resulted from* the rendering of legal services.**

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[1] The removal of the express fraud count that appeared in earlier iterations of the Andros Suit has no bearing on summary judgment, particularly since it repeats all of the factual allegations of the prior pleading. MLM need not and does not rely upon the fraud exclusion.

[2] Given that in the assessment of whether the pleaded allegations of a lawsuit trigger a duty to defend under the insurance policy, the Court need only compare the pleading to the policy, see Penn-America Ins. Co. v. Coffey, 368 F.3d 409, 413 (4th Cir. 2004), there are no material facts in dispute with regard to the "eight corners" determination. Instead, the parties agree as to the Policy's terms and the operative pleading, which is now the Third Amended Complaint. See St. Paul Fire and Marine Ins. Co. v. Compaq Computer Corp., 539 F.3d 809, 816 (8th Cir. 2008) (a court looks only to the latest amended pleading when evaluating an insurer's duty to defend).

In an insurance policy, the term "resulting from" means "proximately caused by". See, e.g., Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co., 863 F.Supp. 1226, 1233 (D.Nev.1994) (holding that " '[r]esulting from' actually confirms use of the efficient proximate cause doctrine [since a] 'loss caused by or resulting from' means a risk which is proximate as distinguished from remote"); Grifith v. Continental Cas. Co., 506 F.Supp. 1332, 1334 (N.D.Tex.1981) ("caused by or resulting from" language means proximate cause); Home Ins. Co. v. Am. Ins. Co., 147 A.D.2d 353, 354, 537 N.Y.S.2d 516 (N.Y.App.Div.1989) (phrase "caused by or resulting from" denotes proximate cause); Westchester Fire Ins. Co. v. Cont'l Ins. Co., 126 N.J.Super. 29, 312 A.2d 664, 668-69 (N.J.App.Div.1973) (equating phrases "caused by" and "resulting from" to proximate cause), aff'd, 65 N.J. 152, 319 A.2d 732 (N.J.1974).

In their Opposition, Antonelli and Stout devote a single paragraph to a conclusory argument that, essentially, because the Third Amended Complaint alleges that Stout's plan to remove the Wireless Email Technology from the clutches of its judgment creditor included some analysis as to whether the technology might be considered distinct from other patents held by Telefind, the claim in the Andros Suit must be one that seeks "damages" "arising out of" an act, error or omission of Stout, and "resulting from" his legal services. The problem is that the Third Amended Complaint nowhere alleges any such damages.

Here, the Third Amended Complaint alleges that Stout advised two non-clients,[3] "Andros and the Richards Investors", how to make off with Telefind's only significant asset, the "Wireless Email Technology", so that it would not be found and seized by Computer Leasco,

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[3] In their Opposition to MLM's motion for summary judgment, Antonelli and Stout drop their assertion, made repeatedly in their own motion for summary judgment, that the Third Amended Complaint "includes a legal malpractice claim against Stout and the Antonelli law firm". See Antonelli Defendants' Memorandum in Support of Motion for Summary Judgment at p. 4. Indeed, the Third Amended Complaint contains no allegation of legal malpractice anywhere.

Telefind's judgment creditor. **The advice is not alleged to have been negligent** – on the contrary, it quite clearly achieved the goal of preventing Computer Leasco from getting its hands on the asset.[4] **Nor is the advice alleged to have caused any damages.** Instead, the damages allegedly occurred when each of three defendants in the Andros Suit – Stout, as well as two other individuals not insured by MLM, William C. White ("White"), and Thomas J. Campana ("Campana") – reneged on their commitment to share any future wealth resulting from the Wireless Email Technology.

Thus, Stout, White, and Campana are each accused of "reneg[ing]" on their "commitment" to share the wealth. The Third Amended Complaint alleges that:

- Stout and his Antonelli partners breached the relationship of trust and confidence when they **reneged on Stout's commitment to share benefits** received from the Wireless Email Technology with Andy Andros and the Richards Investors. ¶ 104.
- Campana . . . breached the relationship of trust and confidence when [his estate's beneficiary and representative] **reneged on Campana's commitment to share benefits** received from the Wireless Email Technology with Andy Andros and the Richards Investors. ¶ 105.
- White breached the relationship of trust and confidence when he **reneged on his commitment to share benefits** received from the Wireless Email Technology and the Wireless Email Patents with Andy Andros and the Richards Investors. ¶ 106.

4 For example, the Third Amended Complaint alleges, at paragraph 88, that Stout was the one "who advised Andy Andros and the Richards Investors regarding the disposition of the Wireless Email Technology in connection with the Telefind bankruptcy." However, the Third Amended Complaint never alleges anywhere that either the Wireless Email Technology or the Wireless Email Patents was lost to Computer Leasco or to any other creditor in bankruptcy. On the contrary, "Computer Leasco was overmatched by NTP in the litigation over the Wireless Email Patents" (¶ 77), "the Michigan federal court accepted the NTP version of the events" (¶ 78), and the issue of ownership of the patents was "resolved by the courts in favor of NTP as result of legal maneuvering of Stout and his firm" and others (¶97).

Stout and his firm are not being sued because their "strategy and "advice" as to how to keep Computer Leasco's hands off the Wireless Email Technology was negligent or wrong. Instead, the Third Amended Complaint alleges exactly the opposite: Stout's strategy worked, Computer Leasco got nothing, and at the end of the day, but for Stout's (and White's and Campana's) breaches of his promise to cut the Andros plaintiffs in on the Blackberry Settlement proceeds, all would have been fine. As such, and for the reasons stated in MLM's Memorandum in Support of its Motion for Summary Judgment and in its Opposition to Defendants' Motion for Summary Judgment, adopted herein by reference, the failure of the Third Amended Complaint to allege that Stout's legal advice caused the claimed damages is fatal to Stout's and Antonelli's claim of coverage here.[5]

II. COVERAGE IS CLEARLY EXCLUDED BY THE POLICY'S BUSINESS ENTERPRISE EXCLUSION.

Assuming *arguendo* that the claims in the Third Amended Complaint could be characterized as seeking damages resulting from the rendering of professional services, there is no coverage by virtue of the Policy's "Business Enterprise Exclusion," Exclusion (3) of the Policy.

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5 See Employers Reinsurance Corp. v. Wilkins-Lowe & Co., Inc., 1994 WL 83244, (7th Cir. Mar. 14, 1994) ("for coverage under a Professional Liability Policy to exist '[t]here must be a direct, causal relationship between the insured's performance of professional services and the underlying claims made against the insured.....'"). There, the Seventh Circuit wrote:

> The allegations of the complaint demonstrate that there is no direct and causal relationship between Wilkins-Lowe's performance of insurance services and any of the potential claims against Wilkins-Lowe for allowing James Hall to use its name. * * * [T]he claims in the National Union litigation are not made against Wilkins-Lowe because the insureds somehow incorrectly performed insurance services. Therefore, the claims do not fall within and the Professional Liability Policy's coverage.

1994 WL 83244, * 3 - 4.

The Business Enterprise Exclusion excludes from coverage any claims that

- arise out of professional services rendered by any insured;
- in connection with any business enterprise (a) owned in whole or in part; (b) controlled directly or indirectly; or (c) managed by any insured;
- where the claimed damages resulted from conflicts of interest with the interest of any client or former client, or with the interest of any person claiming an interest in the same or related business or enterprise.

The exclusion's applicability to the Andros Suit is clear. As alleged in the Third Amended Complaint – and in the language of the Business Enterprise Exclusion – at least one insured defendant, Stout, "**owned in whole or in part**," "**controlled directly or indirectly**," or "**managed**" three "**related**" businesses – Telefind, Flatt Morris, and NTP. According to the Third Amended Complaint, **the relationship of the three businesses, and Stout's ownership/management/control of them, was this**:

- **Telefind** owned something called the "Wireless Email Technology".[6] Stout was both an equity investor in Telefind, Third Amended Complaint ¶ 47, and "actively involved" in its "management", id. ¶ 39. When it appeared that Telefind might lose this valuable asset to a secured creditor, Computer Leasco, one of the MLM insureds, Stout, allegedly concocted a plan to secret away the asset, and ultimately to transfer ownership of the technology and related patents to a company owned in part by Stout and his partners, called NTP.[7] Id. ¶¶ 55, 56, 58, 71.

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[6] See Third Amended Complaint ¶ 42 (the Wireless Email Technology was developed by Telefind) and, thereafter, ¶¶ 44, 46, referring to the technology as an asset of Telefind.

[7] NTP is alleged to be a company with no employees, its address listed as that of Stout's law firm. Its shareholders include Stout and his partners. Third Amended Complaint ¶ 71.

- **Flatt Morris, S.A. ("Flatt Morris")**, a company set up to be a "corporate vehicle" for investors in Telefind, Third Amended Complaint ¶¶ 38, 106, was also a secured creditor of Telefind, id. ¶¶ 38, 67. Stout, as Trustee for Flatt Morris, had a collateral trust agreement with Telefind whereby "Telefind pledged all of its current and prospective intellectual property to Stout to hold in trust for the benefit of Flatt Morris", id. ¶ 38. As part of bankruptcy proceedings that stayed Computer Leasco's judgment execution against Telefind, Flatt Morris engaged in protracted litigation with Computer Leasco.[8] Stout, together with another defendant in the Andros Suit, held a "majority ownership interest" in Flatt Morris, id. ¶ 71; Stout "control[led] Flatt Morris," id. ¶ 70; and Stout and Antonelli represented both Telefind and Flatt Morris in the Telefind bankruptcy, id. ¶ 67.)[9] Stout's plan required the cooperation of the plaintiffs in order for there to be no "documented direct ownership interest" by the plaintiffs "in the Wireless Email Technology" "that could be used by Computer Leasco as a basis for attaching this technology as a Telefind asset". Third Amended Complaint ¶ 60. In return for that cooperation, Stout promised that the plaintiffs would share in any ultimate benefits derived from the technology "once the dust settled" in "the Computer Leasco dispute". Id. ¶60.

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8 See Third Amended Complaint ¶ 68 (Flatt Morris "began jousting" with Computer Leasco in Telefind bankruptcy proceedings for priority position with respect to certain Telefind "Paging Patents".).

9 The Third Amended Complaint alleges that once Telefind defaulted on certain loans to Computer Leasco, **Stout in effect gained control of Telefind's assets through an arrangement by which he held those assets as trustee for Flatt Morris**. See ¶¶ 35, 38.

- **NTP** was a "Virginia-based shell corporation" into which Stout and another defendant in the Andros Suit "transferred the Wireless Email Patents", Third Amended Complaint ¶ 71, which of course had been the plan from the time Stout's **"legal strategy to transfer the Wireless Email Technology into an entity that Stout controlled"** was implemented, id. ¶ 67. Third Amended Complaint ¶ 67. NTP had no employees; and its address was listed as that of Stout's law firm. Its shareholders include Stout and his partners. Id. ¶ 71.

Also as alleged in the Third Amended Complaint – and, again, in the language of the Business Enterprise Exclusion – Stout "**rendered**" "**professional services**" "**in connection with**" Telefind, Flatt Morris, and NTP, in that the entire plan to secret away the technology and ultimately transfer ownership of it to NTP was in fact **a "legal strategy to transfer the Wireless Email Technology into an entity that Stout controlled".** Third Amended Complaint ¶ 67. Stout, who "devised" the strategy, id. ¶ 55, gave the plaintiffs "legal advice" (also termed "pressure tactics" id. ¶ 57) that the strategy would work, i.e. that it would prevent the interest of all the Telefind investors from being lost to Telefind's creditor, Computer Leasco. ¶¶ 55-57. The plaintiffs' suit "**arise[s] out of**" Stout's professional services because plaintiffs claim that after accepting Stout's "legal advice" to cooperate in accomplishing Stout's "legal strategy" (referred to in the Third Amended Complaint as Stout's "scheme"),[10] they ended up with nothing to show for it when Stout and his "cohorts" reneged on their commitment to share the wealth

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10 Part of the alleged "legal strategy" was that a "distinction" could be created under United States patent law between certain patents held by Telefind, called the "paging technology", and the Wireless Email Technology," see Third Amended Complaint ¶ 59. The development of this "legal case" for "distinguishing between the Wireless Email Patents and the Paging Patents" is characterized in the Third Amended Complaint as Stout's "scheme". Id. at ¶ 72.

when the ship came in. Third Amended Complaint ¶¶ 86, 99, 104, 109.[11] The damages "**resulted from**" a "**conflict of interest**" between Stout and the persons he had promised would share in such future benefits (persons who "claim[ed] an interest in the same or related business or enterprise") in that Stout – who allegedly owed plaintiffs a "fiduciary duty" – ultimately kept those benefits for himself, at the expense of the plaintiffs and contrary to the "legal advice" they allegedly relied on. Third Amended Complaint ¶¶ 85-87, 99.

In their brief Opposition, Defendants first argue that the Andros Suit does not allege that Stout provided legal services "in connection with" a business enterprise that Stout owned in whole or in part, controlled directly or indirectly, or managed by any insured, because Stout did not provide legal services **"to"** any such business enterprise.

This argument is based not on the policy as written, but on the policy as Defendants would have this Court rewrite it. Under the exclusion, legal services clearly do not have to be provided "to" the business the insured owns, controls or manages. The legal services merely have to be provided "in connection with" such a business – and the Third Amended Complaint most certainly alleges that. The entire purpose of the purported "legal strategy" devised by Stout was to protect the asset of Telefind, a company he held an equity interest in and as to which he was part of the management of, and to transfer that interest to a company he and his partners were part owners of, NTP.

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11 See Third Amended Complaint ¶¶ 86 (" . . . it for the first time became apparent to the Richards Investors that Stout and his cohorts had no intention of honoring their agreement to share in the proceeds associated with the Wireless Email Technology and the Wireless Email Patents, notwithstanding their role as fiduciaries."), 99 ("Plaintiffs base their claims on their legitimate expectations, confirmed by Defendants' representations and commitments to Plaintiffs, that Plaintiffs would share in the benefits associated with the Wireless Email Patents – regardless of the corporate entity that held "legal ownership of those patents . . . .").

The term, "in connection with", when used in a policy exclusion, has been found to be unambiguous and has been interpreted broadly by the Courts to mean "related to". See Metropolitan Property and Cas. Ins. Co. v. Fitchburg Mut. Ins. Co., 793 N.E.2d 1252, 1255 (Mass. Ct. App. 2003) (While "arising out of" is ordinarily held to mean "originating from, growing out of, flowing from, incident to or having connection with", "[i]n connection with" is ordinarily held to have even a broader meaning than "arising out of" and is defined as "related to, linked to, or associated with"), citing Cameron Mut. Ins. Co. v. Skidmore, 633 S.W.2d 752, 753 (Mo. Ct. App.1982) and Nationwide Mut. Fire Ins. Co. v. Nunn, 442 S.E.2d 340 (N.C. Ct. App. 1994) (finding that business exclusion in homeowner's insurance policy precluded coverage, based on interpretation of the phrase, "in connection with", as being broader than the phrase, arising out of".). See also Acadia Ins. Co. v. Vermont Mut. Ins. Co., 2003 WL 23185875, 1 -2 (Me. Super. Ct. Aug. 18, 2003) (The phrase "in connection with" as used in business pursuits exclusion was unambiguous and excluded coverage. "'In connection with' is ordinarily held to have even a broader meaning than 'arising out of' and is defined as related to, linked to or associated with."). Accord, Kessel v. State Auto. Mut. Ins. Co., 871 N.E.2d 335, 339 (Ind. Ct. App. 2007) (the phrase "in connection with" has been held to have a much broader meaning than "arising out of") (citation omitted); Arndt v. American Family Mut. Ins. Co., 380 N.W.2d 885, 889 (Minn. Ct. App. 1986), aff'd in part, rev'd in part on other grounds, 394 N.W.2d 791 (Minn. 1986) (same).[12]

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12 See also Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (In arbitration agreement, "the plain meaning of the phrase 'arising in connection with' suggests a broader scope than a phrase such as 'arising out of' or 'arising under,' which seem to limit the clause to disputes concerning the contract itself.") (citing Good(E) Bus. Sys., Inc. v. Raytheon Co., 614 F.Supp. 428, 429 (W.D.Wis.1985)).

Here, according to the Third Amended Complaint, the only reason for Stout to have given the "legal advice" to plaintiffs was to implement his "legal strategy" to save the only asset of a company he had an ownership interest in, by transferring that asset to a new company whose owners included Stout and his partners. Under the unambiguous terms of the exclusion, Stout's "legal advice" to the plaintiffs was rendered "in connection with" Stout's business interests.

Defendants next argue that the Business Enterprise Exclusion cannot apply because the Third Amended Complaint nowhere alleges that Stout or his partners held any ownership interest in Telefind, or controlled Telefind in whole or in part. Opposition at 9 ("There are no such specific allegations."). To the contrary, and as set forth above, the Third Amended Complaint clearly alleges not merely that Stout was an "investor" in Telefind **but that he and his partners held an equity interest in Telefind**. Third Amended Complaint ¶ 47 ("Stout and his law partners" "invest[ed] additional equity" in Telefind.). Consequently, the Third Amended Complaint sufficiently alleges that Stout was an owner "in whole or in part". See McQuay v. Penn-America Ins. Co., 91 Fed.Appx. 626, 629 (10th Cir. Nov. 10, 2003) ("An equitable interest exists when a person holds an ownership interest in a venture. Equity refers to the financial definition that an owner's equity in a business is equal to the business's assets minus its liabilities.") (citing Black's Law Dictionary 374 (6th ed.1991)).[13]

[13] Consequently, no basis exists for Defendants' argument – made without citation to authority – that the undefined term, "owned in whole or in part" is ambiguous. Opposition at 12. "[A]n ambiguity does not exist simply because terms are not defined in the policy." Harleysville Mut. Ins. Co. v. Packer, 60 F.3d 1116, 1121 (4th Cir. 1995). To the contrary, an undefined term in an insurance policy "must be given its ordinary and accepted meaning." Lower Chesapeake Assocs. v. Valley Forge Ins. Co., 260 Va. 77, 86, 532 S.E.2d 325, 330 (2000). Furthermore, the "ordinary and accepted meaning" of an undefined term must be based upon the context in which it appears. See e.g., CACI Intern., Inc. v. St. Paul Fire and Marine Ins. Co., 566 F.3d 150, 158 (4th Cir.2009) (writing that the court "can further interpret" an undefined term "by considering its meaning in the context of the policies as a whole"); Atlas Underwriters, Ltd. v. Meredith-Burda, Inc., 231 Va. 255, 258, 343 S.E.2d 65, 67 (1986) (writing that even though certain terms

The Third Amended Complaint's allegations of control are even more pervasive: not only was Stout "actively involved" in its "management", id. ¶ 39, he is alleged to have held a pledge of "all of its current and prospective intellectual property" by virtue of a collateral trust agreement between Telefind and Stout as trustee for Flatt Morris, id. ¶ 38, the latter being a company that Stout "control[led]", id. ¶ 70, and (together with another defendant in the Andros Suit) held a "majority ownership interest" in, id. ¶ 71. Based on those allegations, Stout could not have been more in control of Telefind if he had held it by the neck with vice grips.

Defendants' argument also ignores that from the outset, Stout's alleged "legal service" was a **"legal strategy to transfer the Wireless Email Technology into an entity that Stout controlled",** i.e., NTP. Third Amended Complaint ¶ 67. Stout is most certainly alleged not only to have "controlled" NTP, but to have been an owner of it (together with Stout's law partners). **Moreover, for purposes of the Business Interests Exclusion, NTP did not have to exist as a legal entity when this "legal strategy" was implemented**, especially where the whole point of the alleged "scheme" was for the company to be formed and to receive the Telefind assets. See Coregis Ins. Co. v. Bartos, Broughal & DeVito, LLP, 37 F.Supp.2d 391, 394 (E.D.Pa. 1999) ("Defendants first contend that the language of Exclusion G, which requires that the insured's activities 'arise out of' or be 'in connection with' the conduct of any business enterprise other than the named insured, only applies to business enterprises that are in existence at the time of the alleged malpractice. * * * [W]e agree with Coregis that the clear and unambiguous language of Exclusion G **does not require that the partnerships be in legal existence at the time the alleged malpractice occurred** in order for the exclusion to apply.")

are not defined in the policy, "we hold that in the context of this insurance contract these crucial words are clear and unambiguous").

(emphasis added),[14] citing Dukart v. National Union Fire Ins. Co., 1993 WL 331175, *1 (Del. Super. Ct. July 13, 1993) ("The language does not require that the act of alleged malpractice or, for that matter, any other event, such as the accrual of the cause of action or the making of a claim, occur during the existence of the legal entity used to carry on the business enterprise. It simply defines the insured's relationship to the particular form of business enterprise in which the lawyer participates. * * * It is consistent with the purpose of the exclusion to interpret it as applying to a claim of the kind that the Dukarts are making against Neuberger, even though the alleged act of malpractice may have occurred before the partnerships were formed.").[15]

III. COVERAGE IS ALSO EXCLUDED BY THE POLICY'S SPECIFIC ENTITY ENDORSEMENT.

In addition, coverage is precluded, and MLM had no duty to defend, pursuant to the Policy's Specific Entity Exclusion Endorsement. That endorsement states in its entirety:

The following exclusion is added to the Exclusions section of the policy:

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[14] Defendants attack MLM's citation to Coregis Ins. Co. v. Bartos, Broughal & DeVito, LLP and several other cases on the basis that the business exclusions in those cases contain language so different as to make them inapplicable. Opposition at 13. To the contrary, the policies in cited cases contained exclusions very similar to Exclusion 3. See e.g., Coregis Ins. Co. v. Bartos, Broughal & DeVito, LLP, 37 F.Supp.2d 391, 394 (E.D.Pa. 1999) ("...any business enterprise...directly or indirectly controlled, operated or managed by any INSURED either individually or in a fiduciary capacity"); Mt. Airy Ins. Co. v. Greenbaum, 127 F.3d 15 (1st Cir. 1997) ("...a business enterprise...owned by any Insured...or which is directly or indirectly controlled, operated or managed by any INSURED either individually or in a fiduciary capacity"); Home Ins. Co. of Indiana v. Walsh, 854 F. Supp. 458 (S. D. Tex. 1994) ("...a business enterprise...owned by any Insured...or which is directly or indirectly controlled, operated or managed by any INSURED either individually or in a fiduciary capacity"); American Guarantee & Liability Ins. Co. v. Timothy S. Keiter, P.A., 360 F.3d 13, 16 -17 (1st Cir. 2004)("...business enterprise...in which any Insured has any pecuniary or beneficial interest, irrespective of whether or nor an attorney-client relationship exists...").

[15] Defendants' contrary argument, Opposition at 15, cites not a single case in support thereof.

Any CLAIM resulting from any act, error or omission arising out of rendering or failing to render PROFESSIONAL SERVICES to or on behalf of the following individual(s), business enterprise(s) or organization(s):

NTP Incorporated

The Third Amended Complaint alleges that, as an integral part of Stout's scheme, NTP successfully established its ownership of the Wireless Email Patents through the offering of a false affidavit from Andrew Andros (whose estate is one of the plaintiffs in the Andros Suit) claiming Telefind had no ownership interest in the patents. Third Amended Complaint ¶¶ 73-78. The claim consequently arises out of the rendering of professional services to NTP, because defending the patent ownership by means of Andros' cooperation in the scheme to remove any evidence of them ever having been owned by Telefind, was a key component of the "legal strategy" that the plaintiffs in the Andros Suit claim they relied on and went along with, to their ultimate detriment.

IV. DELAY OF AT LEAST FIVE MONTHS IN REPORTING SUIT AGAINST STOUT IS A MATERIAL BREACH OF A PRECONDITION TO COVERAGE.

Stout's delay of some five months in reporting the Andros Suit naming him as a Defendant constitutes late notice as a matter of law and precludes coverage as to Stout. This is the clear result from the language of the Policy requiring "immediate" notice of a claim, supported by the case law, and Stout does not offer any serious opposition.

At the outset, Defendants contend in their Opposition (again without citation to case authority) that an insurer who seeks to enforce a late notice provision in a policy "concede[s]" that it has a duty to defend. Opposition at 17. This stands the law on its head with regard to notice provisions in an insurance policy. In Virginia, compliance with such notice provisions is a "condition[ ] precedent to coverage under the policy, requiring substantial compliance by the insured." State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 599, 272 S.E.2d 196, 200 (Va.

1980). Upon a material breach of a notice provision, the insurer is "justified in denying coverage under the insurance contract," irrespective of proof of prejudice. Id. An assertion of a breach of the notice provision is not a concession that, had notice been given, the Policy would have provided coverage – instead, it precludes any need to inquire further as to coverage because the insured's failure to give timely notice violates a precondition to coverage.

Defendants next argue – again, without citation to authority – that Stout's late notice is excused because the original complaint has been amended, and MLM received timely notice of the amended pleadings. As baseless as such a contention is, it has in fact been made – and dismissed as specious – in other cases.

> In what appears to be a misguided attempt by Miraglia to overcome his failure to give timely notice and make timely delivery of suit papers, . . . Miraglia argues that the late notice issue has become moot because the underlying plaintiffs filed second amended pleadings in the Texas state court suits, and he immediately gave notice to State Farm of his receipt of the newly amended pleadings. **Needless to say, Miraglia does not cite any authority as support for what appears to be a frivolous contention.**
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> **Needless to say, once coverage is lost as to certain claims by an insured's failure to comply with the insurance policy's notice conditions, coverage cannot be revived as to those claims by the mere filing by the underlying plaintiff of an amended pleading, followed by expeditious delivery thereof to the insurance company.** More to the point, delivery by Miraglia to State Farm in April 2008 of amended pleadings in the Texas state court suits could not conceivably cure Miraglia's failure to timely notify State Farm in August 2003 that "something [had] happen[ed] that might involve this policy." *Supra* at 21.

State Farm Fire & Cas. Co. v. Miraglia, 565 F.Supp.2d 709, 730-31 (N.D.Tex. 2008) (emphasis added).

Defendants next contend there are genuine issues of material fact that precludes summary judgment as to Stout's late notice, but do not identify what those might be. Instead, it is clear from the affidavits submitted by both sides that a copy of the Andros Suit was first provided to MLM on August 15, 2008 see Opposition ¶ 5 and Moon Affidavit ¶ 5 (attached to MLM's Memorandum of Law in Support of Motion for Summary Judgment). Stout nowhere disputes that he was named as a defendant in the original complaint filed on February 22, 2008, and in a first amended complaint filed March 22, 2008, and that he gave no notice to MLM of the either of these pleadings or otherwise provided notice of the claim until August 15, 2008, when the Antonelli firm provided MLM with a copy of the Second Amended Complaint.

Stout then argues that approximately 140 days is not sufficient to establish late notice as a matter of law, that MLM is therefore required to demonstrate prejudice, and that Stout is entitled to discovery to determine whether he might uncover evidence that MLM was not prejudiced. Opposition at 17-18. First of all, a host of decisions applying Virginia law (none of which is cited by Defendants) have found delays much shorter than five months to be material as a matter of law. See e.g., Yanago v. Aetna Life Ins. Co., 164 Va. 258, 178 S.E. 904 (1935) (upon remanding, court stated that insured's delay to give notice for fifty-eight days would be late as a matter of law); Atlas Ins. Co. v. Chapman, 888 F. Supp. 742 (E.D. Va. 1995) (" . . . the Court finds that as a matter of law, **the four month delay in notifying the insurer, without any excuse or sufficient justification, constitutes a substantial and material breach of the notice provision, which is a condition precedent to coverage.**"), aff'd, 92 F.3d 1176, 1996 WL 436562 (4th Cir. July 23, 1996); Lord v. State Farm Mut. Auto. Ins. Co., 224 Va. 283, 295 S.E.2d 796 (1982) (173-day delay); Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 324, 288 S.E.2d 469 (1982) (51-day delay); State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 272 S.E.2d 196 (1980) (seven months).[16]

Second, cases cited by Stout finding longer periods of delay also to be material hardly stand, for that reason alone, for the proposition that a short period is not material. One case cited by Stout, Penn-Am. Ins. Co. v. Mapp, 461 F.Supp.2d 442, 456 (E.D. Va. 2006), for the proposition that a two year delay was not unreasonable as a matter of law under the circumstances of that case, is significantly distinguishable. First, as the Court there was careful to point out, the insured in that case had "a valid excuse for delay". 461 F.Supp.2d at 456 (distinguishing Atlas Ins. Co. v. Chapman on that basis). Indeed, the case cited and distinguished in Mapp, Atlas Ins. Co. v. Chapman, would appear to stand for the proposition that, in the absence of some evidence of extenuating circumstances justifying his five month delay in reporting, consideration of prejudice is not required and Stout's delay must be deemed material as a matter of law. See supra, 888 F. Supp. at 455.

Second, the policy in Mapp required only notice "as soon as practicable" rather than "immediate[ly]" as in the present case. See Cade & Saunders, P.C. v. Chicago Ins. Co., 307 F.Supp.2d 442, 449-50 (N.D.N.Y. 2004) ("Importantly, unlike the present action, in [Chicago Ins. Co. v. Borsody] neither the triggering event nor the date thereof was at issue. Also, that case

16 Jurisdictions outside Virginia have held that similar periods of delay violated the provisions of LPL policies requiring notice "immediately" or "as soon as practicable". See Chicago Ins. Co. v. Borsody, 165 F.Supp.2d 592 (S.D.N.Y. 2001) Under New York law, insured's 40-day delay in forwarding cross-claim to professional liability insurer was not justified under policy provision requiring insured to "immediately" notify insurer of every demand, notice, summons or other process. As in Virginia, New York state and federal courts have held relatively short delays in providing notice of an actual or potential claim to violate such a notice requirement. See, e.g., Goodwin Bowler Assocs., Ltd. v. Eastern Mutual Ins. Co., 259 A.D.2d 381, 687 N.Y.S.2d 126, 127 (1st Dep't 1999) (2 months). See generally American Ins. Co. v. Fairchild Indus., Inc., 56 F.3d 435, 440 (2d Cir.1995) ("Under New York law, delays for one or two months are routinely held 'unreasonable' ").

involved notice of an actual claim, as opposed to a potential claim. What is more, as just mentioned, the *Borsody* policy required immediate notice whereas plaintiffs' policy required notice 'as soon as practicable.' That distinction is significant because 'policy provisions mandating immediate notice ... set[ ] forth an ironbound requirement, in contrast to policy provisions providing a more elastic standard.'"), quoting Chicago Ins. Co. v. Borsody 165 F. F.Supp.2d 592, 598-599 (S.D.N.Y. 2001).

Nevertheless, MLM was prejudiced in that rather than notify MLM of the lawsuit so that it could appoint defense counsel, Stout chose to be defended by the same firm that is also representing White and six other non-insured defendants, creating risks relative to potential conflicts, Moon Aff. ¶ 7[17] – indeed, it is infinitely more difficult to ascertain whether certain information known to Stout that might be material to liability and settlement, and which is now possessed by the seven non-insured defendants due to the joint representation, will negatively affect the ability to defend Stout or to evaluate settlement. In the case principally relied on by Stout, Nationwide Mut. Ins. Co. v. Boyd Corp., 2010 WL 331757 (E.D. Va. Jan. 25, 2010), while the Court ruled that on the facts of that case – involving a three month delay between receipt of a threat of a lawsuit, and notice to the carrier of the actual lawsuit – materiality was not established as a matter of law, the Court then readily determined that materiality was established based on the uncontested facts which showed that the parties had attempted an unsuccessful mediation during the three month period at issue. "The controversy at hand, however, involves hundreds of thousands of dollars in potential liability, complex legal issues, and protracted

[17] This has also made it more difficult to ascertain whether various defense costs were incurred on behalf of MLM's insureds as opposed to the other seven defendants represented by the same counsel, Moon Aff. ¶ 7, no small consideration when dealing with a suit so expensive to defend and a policy under which defense costs deplete available indemnity coverage.

litigation. Delay in notifying the insurance carrier hindered its ability to investigate the claim and prepare for trial." 2010 WL 331757, * 6.

Stout makes no factual argument and offers no evidence on summary judgment as to prejudice, and certainly offers no evidence of extenuating circumstances justifying his five month delay in reporting. Again, in Nationwide Mut. Ins. Co. v. Boyd Corp., upon finding what essentially was the potential for prejudice (in that there were no facts actually demonstrating whether Nationwide's participation in pre-suit mediation would have made any difference), the complete absence of justification for delay left the Court with no alternative but to find that the notice condition had been violated, precluding coverage. 2010 WL 331757, * 7.

CONCLUSION

The allegations in the Third Amended Complaint are not that Antonelli and Stout provided inaccurate or negligent legal advice which was relied upon to the damage of the underlying plaintiffs in the Andros Suit. On the contrary, the allegation is that Antonelli and Stout first concocted a dishonest scheme (labeled as a "legal strategy") to evade a creditor, and that the scheme was a total success. Antonelli and Stout are alleged to have subsequently double-crossed the underlying plaintiffs by breaking oral promises and keeping the spoils of the later Blackberry settlement. There is no coverage as a matter of law, the exclusions apply as a matter of law, and for the reasons set forth above, Minnesota Lawyers Mutual Insurance Company respectfully requests that Plaintiff's Motion for Summary Judgment be granted.

Date: May 7, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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